IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1971
No. 71-36

STATE OF CALIFORNIA, DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, et al.,

Appellants,

vs.

ROBERT LaRUE, et al.,

Appellees and Petitioners.

---

# PETITION FOR REHEARING

---

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

---

Law Offices of
HARRISON W. HERTZBERG,
By HARRISON W. HERTZBERG,

Attorneys for Plaintiffs
La Rue, et al.

Law Offices of
BERRIEN E. MOORE,
By KENNETH SCHOLTZ,

Attorneys for Plaintiffs,
Jennings, et al.

WARREN I. WOLFE and
DONALD BOSS,
By WARREN I. WOLFE,
3550 Wilshire Blvd.
Suite 1418
Los Angeles, Ca. 90010
(213) 381-1121

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. _____

STATE OF CALIFORNIA, DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, et al.,

Appellants,

vs.

ROBERT LaRUE, et al.,

Appellees and Petitioners.

---

# PETITION FOR REHEARING

---

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

---


Law Offices of
HARRISON W. HERTZBERG,
By HARRISON W. HERTZBERG,

Attorneys for Plaintiffs
La Rue, et al.

Law Offices of
BERRIEN E. MOORE,
By KENNETH SCHOLTZ,

Attorneys for Plaintiffs,
Jennings, et al.

WARREN I. WOLFE and
DONALD BOSS,
By WARREN I. WOLFE,
3550 Wilshire Blvd.
Suite 1418
Los Angeles, Ca. 90010
(213) 381-1121

## TOPICAL INDEX

## TABLE OF AUTHORITIES

### Cases

| Miscellaneous | Page |
|---|---|
| 74 Cong. Rec. p. 64 | 4 |
| 74 Cong. Rec. p. 65 | 3 |
| 74 Cong. Rec. p. 1621 | 4, 8 |
| 74 Cong. Rec. p. 4141 | 4 |
| 74 Cong. Rec. p. 4147 | 9 |
| 74 Cong. Rec. p. 4148 | 10 |
| 74 Cong. Rec. p. 4168 | 5 |
| 74 Cong. Rec. p. 4172 | 5, 6 |
| 74 Cong. Rec. p. 4177 | 9 |
| 74 Cong. Rec. p. 4219 | 5 |
| 74 Cong. Rec. p. 4225 | 10 |

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. _____

STATE OF CALIFORNIA, DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, et al.,

Appellants,

vs.

ROBERT LaRue, et al.,

Appellees and Petitioners.

---

# PETITION FOR REHEARING

## I

## THE TWENTY-FIRST AMENDMENT GRANTS NO AUTHORITY TO STATES TO CONDITION THE RIGHT TO SELL ALCOHOLIC BEVERAGES ON A WAIVER OF FIRST AMENDMENT RIGHTS

In this petition we shall show that the majority's reliance on the Twenty-First

Amendment to validate Rules 143.3 and 143.4 is mistaken and erroneous. We shall show that the sole purpose and effect of repeal was to return to the states the regulatory authority held by them prior to prohibition under their domestic police power as amplified the Webb-Kenyon Act, without the grant of any further authority or power.

Without specifying its exact effect, the majority relies on the Twenty-First Amendment as a grant of authority to the states to admittedly abridge First-Amendment rights.[1/] The majority's conclusions

---

1/ "While the States, vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power, the broad sweep of the Twenty-First Amendment has been recognized as conferring something more than the normal state authority over public health, welfare and morals." Opinion, p. 5.

"But the case for upholding State regulation in the area covered by the Twenty-First Amendment is undoubtedly strengthened by that enactment. . . ." Opinion, p. 6.

"Given the added presumption in favor of the validity of the state

 (continued)

are neither by citation to previous case authority involving abridgement of fundamental rights nor by citation to authority, history or reasoned analysis. To the contrary, the error of the majority opinion is shown with surprising unanimity in both the congressional debates on the Twenty-First Amendment and in the decisions of this Court.

Section 2 of the Twenty-First Amendment was based upon the Webb-Kenyon Act[2/] - its purpose was to enshrine in the Constitution the right of states to prohibit or regulate the importation of alcoholic beverages free of limitations flowing from the commerce clause. Indeed, the initial draft of the Twenty-First Amendment introduced in the Senate made express reference to the commerce clause.[3/] Its sponsor described it

---

1/ Continued:

regulation in this area which the Twenty-First Amendment requires, . . ." Opinion, pp. 9-10.

2/ 27 U.S.C. §122.

3/ 74 Cong. Rec., p. 65. It provided, in relevant part, "The provisions of claus 3 of section 8 of Article I of the Constitution . . . shall not be construed. . . ."

as proposing "to amend the interstate commerce law so as to make intoxicating liquor for beverage or other purposes, for use in States which prohibit intoxicating liquors, subject to the laws of such States, leaving all other States which choose to adopt any system of liquor control free to legislate without any constitutional inhibition or control by the Congress."[4/]

When the resolution was reported out of committee, Section 2 had been rewritten as later enacted,[5/] but its sponsor continued to describe its effect in the original terms.[6/] Throughout the debate in the Senate, both proponents and opponents of repeal clearly expressed their understanding that Section 2 was intended solely to permit States to legislate free of commerce clause restrictions, and with Federal help

---

4/ 74 Cong. Rec., p. 64, Statement of Sen. Blaine.

5/ 74 Cong. Rec., p. 1621.

6/ 74 Cong. Rec. p. 4141. Sen. Blaine said, "This proposal is restoring to the States, in effect, the right to regulate commerce, respecting a single commodity - namely, intoxicating liquor."

against out of State bootleggers.[7] Section 2 was expressly described by Sen. Borah as incorporating the Webb-Kenyon Act into the Constitution.[8]

---

7/ Sen. Fess, an opponent of repeal, observed, " . . . the second section . . . is designed to permit the Federal authority to assist the States that want to be dry to remain dry." 74 Cong. Rec. p. 4168.

Sen. Borah, a leading opponent of repeal, said in discussing Section 2:

> "I have no doubt, if the amendment is adopted, that it will be within the power of Congress, as well as within the power of the State, to punish those who ship liquor into a dry state." 74 Cong. Rec. p. 4172.

A proponent, Sen. Walsh, said,

> "The purpose of the provision . . . was to make the intoxicating liquor subject to the laws of the State once it passed the State line and before it gets into the hands of consignee as well as thereafter." 74 Cong. Rec. p. 4219.

8/ "I venture the opinion, and it is my belief that the Eighteenth Amendment would never have been adopted had it not been for the open, brazen, corrupt, persistent defiance of the laws of dry States by the liquor interests outside those States. At the time the Eighteenth Amendment was adopted, 33

(Continued)

Since Section 2 of the Twenty-First Amendment serves to embed a concise form of the Webb-Kenyon Act in the Constitution, cases interpreting that Act are clearly germane. State of Georgia v. Wenger, 94 F. Supp. 976 (D.C. Ill. 1950), cert. denied

---

8/ Continued:

States had prohibition in some form. The people had declared they wanted to be rid of this evil, or at least to control it in their own way. These states were invaded, their laws broken, their officials corrupted, by the same influences which now plead for States rights and local control. They did not at that time respect that right at all. They trampled upon it and scoffed at it. Therefore, if we are to have what we are now promised, local government, States rights, the right of the People of the respective states to adopt their own policies, we must have some other method, some other provisions of the Constitution, than those which existed prior to the adoption of the Eighteenth Amendment.

"All this was sought to be remedied by the Webb-Kenyon Act, and I am very glad indeed the able Senator from Arkansas [Sen. Robinson] was seen fit to recognize the justice and fairness to the States of incorporating it permanently into the Constitution of the United States." 74 Cong. Rec. p. 4172.

342 U.S. 822. Those decisions clearly reflect the precise and limited purpose of the Act. In Adams Express Co. v. Kentucky, 238 U.S. 190 (1915) it was held that the Webb-Kenyon Act did not prohibit all shipments of liquor into States with prohibitory laws, but only those shipments made with intent to violate local law. In that case a State law prohibiting shipment of liquor by public or private carrier was held not applicable to an interstate shipment intended for personal use of the consignee when such personal use was itself legal under state law. The Webb-Kenyon Act was held to be a constitutional exercise of the power of Congress to permit state regulation of interstate commerce in James Clark Distilling Co. v. Western Maryland Ry. Co., 242 U.S. 311 (1917), which also held that an express prohibition of interstate shipment for personal use was proper under the Act. In McCormick & Co. v. Brown, 286 U.S. 131 (1932) this Court held that the Webb-Kenyon Act was neither repealed nor modified by the Eighteenth Amendment and, as a result, States could prohibit interstate commerce in all intoxicating liquors

as defined under State law, unlimited by the less-restrictive provisions of the National Prohibition Act. The Webb-Kenyon Act was described at page 142 of that opinion as being intended to aid the enforcement of state prohibitory laws.

The proposition that the Twenty-First Amendment did not grant any power to the States other than the power to exercise domestic police power free from the restrictions of the Commerce Clause is buttressed by the Senate debate over proposed Section 3, which was deleted from the Amendment. Section 3 would have given concurrent power to Congress and the states to regulate or prohibit sale for consumption on the premises.[9/] It was not included in the Twenty-First Amendment because it would compromise the full restoration to the states of their rights over intoxicating liquor[10/] and would leave open the

---

9/ 74 Cong. Rec. p. 1621.

10/ Sen. Blaine said,

"The purpose of Section 2 is to restore to the States by constitutional amendment absolute control in effect over interstate commerce affecting

(Continued)

possibility of national prohibition,[11] on the one hand, or national repeal[12] on the other. It must be remembered that the Eighteenth Amendment had taken from the states all power to regulate intoxicating liquors in a manner conflicting with national prohibition. Vigliotti v. Pennsylvania, 258 U.S. 403 (1922). Thus the Twenty-First Amendment was viewed as a

---

10/ Continued:

intoxicating liquors which enter the confines of the States. Thus the States under Section 2 may enact certain laws on intoxicating liquors, and Section 2 at once gives such laws effect. Thus the States are granted larger power in effect and are given greater protection while under Section 3 the proposal is to take away from the States the powers that the States would have in the absence of the Eighteenth Amendment. My view therefore is that Section 3 is inconsistent with Section 2, and the two sections are incompatible, and that Section 3 ought to be taken out of the resolution."

11/ See remarks of Sen. Wagner at 74 Cong. Rec. p. 4147.

12/ See remarks of Sen. Black at 74 Cong. Rec. p. 4177.

restoration of power which the States had previously had rather than a grant of new power to them.[13] The defeat of Section 13 left the Twenty-First Amendment devoid of any grant of power over sales by the drink either to the states or the Federal Government, the restoration of state power being effected by Section 1, which repealed the Eighteenth Amendment.[14]

This legislative history has been respected by all previous decisions of this Court which have interpreted the Twenty-First Amendment. Not only has the effect of Section 2 been limited to the control of imports into states,[15] but the court has

---

13/ As Sen. Wagner observed, "The problem confronting us, Mr. President is to choose between two alternative courses. Either the Control of the local liquor traffic is to remain in the Federal Government or is to be restored to the States." 74 Cong. Rec. 4148.

14/ The Senate also rejected proposals which would have restricted State power by constitutionally prohibiting sales for consumption on the premises. 74 Cong. Rec. p. 4225.

15/ State Board of Equalization v. Youngs Market, 299 U.S. 59 (1936) where the court said,

(Continued)

eschewed reliance on it when ruling on other exercises of State power.[16] Thus there

---

15/ Continued:

> "The Amendment which 'prohibited' the 'transportation or importation' of intoxicating liquors into any state 'in violation of the laws thereof,' abrogated the right to import free, so far as concerns intoxicating liquor."

Mahoney v. Joseph Triner Corporation, 304 U.S. 401 (1938) in which the court held that unreasonable discrimination against imported liquor was permissible.

Indianapolis Brewing Co. v. Liquor Control Commission, 305 U.S. 391 (1939) in which the court upheld a retaliatory law prohibiting imports from states which prohibit imports.

Zifferin Inc. v. Reeves, 308 U.S. 132 (1939) in which the court said,

> "The Twenty-First Amendment sanctions the right of the state to legislate concerning intoxicating liquors brought from without unfettered by the commerce clause."

16/ Duckworth v. State of Arkansas, 314 U.S. 390 (1941) in which a permit requirement for through shipments of alcoholic beverages was approved as a reasonable regulation on local shipment without regard to the Twenty-First Amendment.

Carter v. Commonwealth of Virginia, 321 U.S. 131 (1944), another through shipment case, in which the court said,

(Continued)

are no cases in which the court has sanctioned State violation of any constitutional provision as a result of the Twenty-First Amendment, except those expressly relating to the commerce clause.

Rules 143.3 and 143.4 concededly violate the First Amendment and could not be upheld, for the reasons already stated in appellee's brief, in the absence of the majority's mistaken reliance on the Twenty-First Amendment.

---

16/ Continued:

> "we are satisfied that Virginia may, notwithstanding the Commerce Clause and independently of the Twenty-First Amendment, in order to protect herself from illicit liquor traffic within her borders, subject the shipment of liquor through Virginia to the regulations here in question.

Goesaert v. Cleary, 335 U.S. 464 (1948), in which an equal protection attack against regulation of female bartenders was approved under the Fourteenth Amendment, as not being an "irrational discrimination." No First Amendment claims were made in that case.

Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964), which held that the Twenty-First Amendment did not permit imposition of a state tax on sales of liquor in foreign commerce. The majority's reliance on this case seems unjustified in view of its result.

The majority opinion would appear to authorize a wide variety of restrictions on fundamental rights in the guise of liquor regulations. For example:

- Rules requiring bars to be racially segregated, justified as an aid in avoiding fights and other disturbances.

- Rules requiring the issuance of licenses to churches for use of sacramental wine, justified as an aid to enforcement of other license laws.

- Rules prohibiting the playing of rock music or Wagnerian operas on licensed premises, as a means of noise control.

- Rules requiring licensees to conspicuously post copies of the Lords Prayer and forbidding issuance of licenses to atheists, justified as an aid to temperance.

- Rules forbidding sale of packaged liquor to persons who privately possess visual representations described in California Rule 143.4, justified as an aid in preventing

rapes and indecent exposures.

Under the majority decision, restrictions on fundamental rights such as those described above would only have to satisfy the most liberal due process test in order to pass constitutional muster. Such a result is wholly contrary to countless decisions of this Court and wholly unsupported by the Twenty-First Amendment.

Respectfully submitted,

Law Offices of
HARRISON W. HERTZBERG,
By HARRISON W. HERTZBERG,

Attorneys for Plaintiffs
La Rue, et al.

Law Offices of
BERRIEN E. MOORE,
By KENNETH SCHOLTZ,

Attorneys for Plaintiffs,
Jennings, et al.

WARREN I. WOLFE and
DONALD BOSS,
By WARREN I. WOLFE,

Attorneys for Plaintiffs
Mac Lean

I, KENNETH SCHOLTZ, hereby certify that this petition is presented in good faith and not for the purpose of delay.

/s/ Kenneth Scholtz
KENNETH SCHOLTZ